## II. This Court Should Grant Certiorari To Clarify The Constitutional Constraints On Sanctions Against The Press That Are Related To The Claim For Which Discovery Was Sought.

Apart from the default judgment on the libel claim against the Globe and Knox, the Massachusetts Supreme Judicial Court also upheld the trial court's entry of a default judgment with respect to Respondent's claim against Knox for intentional infliction of emotional distress and interference with business relations. These claims, which no court ever ruled had sufficient merit even to withstand Petitioners' summary judgment motion, produced a jury verdict for damages in the amount of $210,000. Pet. for Cert. 8. Unlike the situation with respect to her libel claim, Respondent asserted that the identities of the sources Petitioners refused to divulge were relevant to these claims against Knox. Pet. App. 46a, 79a. But the default judgment with respect to these latter claims is no more legitimate than with respect to the libel claims. And the threat in this context to the proper functioning of the press is no less serious.

This Court has long held that "there are [due process] limitations upon the power of courts, even in aid of their own valid processes, to [terminate] an action without affording a party an opportunity to be heard on the merits." *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 209 (1958). Although a court armed with a discovery-sanction rule such as Mass. R. Civ. P. 37 may treat a refusal to respond to a discovery request as an admission of the specific fact at issue, a court may not – as the Massachusetts Supreme Judicial Court did here – deny "all right to defend" as punishment for refusing to respond to a particular discovery request. *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 350 (1908); *see also Hovey v. Elliott,* 167 U.S. 409 (1897) (default judgment violated due process because defendant's

noncompliance did not pertain to merits of defense). This is especially so when a court, as here, acknowledges that the information sought in the discovery dispute is "peripheral at best" to the merits. Pet. App. 49a.

Furthermore, as the New York Court of Appeals has recognized, this "general rule, that the demanding party should not be granted more relief for nondisclosure than is reasonably necessary to protect legitimate interests, should be applied with special force in cases involving nondisclosure of sources by newspapers and journalists," lest "[t]he consequences of nondisclosure imposed . . . create new obstacles to newsgathering." *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 166 (1985). This is so for four intertwining reasons. First, when, as here, a plaintiff sues the press based on news articles it has published, the First Amendment prohibits imposing tort liability upon the press unless the reporting at issue was false. *See The Florida Star v. B.J.F.*, 481 U.S. 524 (1989); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979).

Second, this Court has held that the First Amendment prohibits states from placing the "burden of proving" the truth of news stories on the press. *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964). Whenever, as here, the news story at issue is one of "public concern," the "plaintiff . . . [must] show[] that the statements at issue are false." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986).

Third, even if plaintiff proves that the press has published false statements, the First Amendment requires plaintiff demonstrate by clear and convincing evidence that the press published with the applicable degree of fault – here, actual malice since plaintiff is a public figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *see also*

*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (fault required to recover for intentional infliction of emotional distress). Allowing juries to impose liability without a showing of fault reinstates the strict liability rule that this Court explicitly rejected in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), because of its chilling effect on reporting matters of public concern.

Fourth, even if a plaintiff proves that the press published false statements and did so with the requisite degree of fault, the First Amendment precludes requiring the press to pay damages that are not connected to actual harm that the plaintiff has suffered, such as presumed or punitive damages, unless a court also finds that the defendant acted with actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974). Allowing juries to assign damages beyond such limits "invites [them] to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." *Id.* at 349.

That is exactly what can happen when a court enters a default judgment without actually finding false statements of fact and actual malice, and it is exactly what happened in this case. Instead of imposing a financial sanction tailored to address Petitioners' failure to comply with its discovery order, the trial court essentially left it to the jury to punish Petitioners – and, even worse, allowed the jury to peg its sanction to supposed harm caused by the newspaper articles. Since nothing in those articles was ever proven actionable, there is a great danger that the jury decided to punish Petitioners for constitutionally protected conduct such as espousing an unpopular opinion or "spotlighting" a controversial individual. *See* Pet. App. 49a (describing Respondent's "spotlighting" argument). This danger of punishing such protected speech is far too great for the First Amendment to bear.

It thus should come as no surprise that in every instance of which *Amici* are aware that a trial court has entered a default judgment against the press for declining to abide by a disclosure order, that judgment has been overturned on appeal. In *Sierra Life Insurance Co. v. Magic Valley Newspapers, Inc.*, 623 P.2d 103 (Idaho 1981), for example, the trial court entered a default judgment against a newspaper for declining to reveal a confidential source relevant to a libel claim. On appeal, the Idaho Supreme Court, relying on the federal due process cases cited above and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), explained that "a defendant ought not profit from his own refusal to make discovery, but such recalcitrance should not take away those defenses which are not affected by his refusal to disclose." *Id.* at 107. It then reversed the judgment because the plaintiff was unable to show that "its inability to discover the confidential sources obstructed its ability to prove the falsity of the publications." *Id.* at 108; *see also Hemingway v. Fritz*, 529 P.2d 264, 266 (Idaho 1974) (default judgment improper if source is irrelevant to certain issues in case).

In *Mitchell v. Watson*, 361 P.2d 744 (Wash. 1961), the trial court likewise entered a default judgment against a newspaper reporter for refusing to divulge a confidential source. The Washington Supreme Court reversed, based on the federal due process "principles announced in the *Hovey* and *Hammond* cases," as well as the *Societe Internationale* case, because the source did not pertain to "all of the issues raised by the pleadings." *Mitchell*, 361 P.2d at 749. The New York Court of Appeals has reached a similar result based on due process and free speech principles. *See Oak Beach Inn*, 62 N.Y.2d at 167 (default judgment "intolerably burden[ed] the newspaper").

The Massachusetts Supreme Judicial Court's decision here conflicts with all of these decisions. It allows a public-

figure plaintiff to obtain a judgment against a journalist without requiring the plaintiff to prove the constitutional elements of falsity and actual malice – or at least to show how the identities of the sources could have allowed her to prove them. Worse yet, the Massachusetts Supreme Judicial Court held that trial courts have a "broad measure of discretion" to impose such sanctions in future cases. Pet. App. 50a (quotation omitted). This standard ignores the fundamental constitutional protections implicated by default judgments against the press.

The Massachusetts Supreme Judicial Court's decision also implicitly conflicts with scores of other decisions taking more narrowly tailored steps than default to address press refusals to comply with disclosure orders. The other decisions are all based on local jurisdictions' civil rules governing discovery sanctions. But they all respect constitutional constraints against granting default judgments against the press when plaintiffs have not shown their claims have at least potential merit.

These decisions take two kinds of actions. First, courts have barred the press from relying on the trustworthiness of confidential sources in its defense. These measures allow the jury to draw an inference, in the absence of other evidence, that the source was unreliable or did not exist. *See Dowd v. Calabrese,* 577 F. Supp. 238, 244 (D.D.C. 1983) (defendants "may not rely upon the existence of any unidentified source as evidence"); *DeRoburt v. Gannett Co.,* 507 F. Supp. 880, 886-87 (D. Haw. 1981) (failure to reveal sources creates presumption that no sources exist); *Sands v. News America Pub. Inc.,* 161 A.D.2d 30, 37 (N.Y. Sup. Ct. 1990) ("defendants should be precluded from introducing into evidence confidential information"); *Oak Beach Inn,* 62 N.Y.2d at 167 (defendant must defend action "without placing any reliance on its source"); *Downing v. Monitor Public Co.,* 415 A.2d 683, 686 (N.H. 1980) ("there

shall arise a presumption that the defendant had no source"); *Rancho La Costa v. Penthouse,* 6 Media L. Rep. 1540 (Cal. Super. 1980) (same); *Greenberg v. CBS Inc.,* 69 A.D.2d 693, 709 (N.Y. Sup. Ct. 1979) (defendants "precluded from any use of those sources and information as proof" at trial); *Kapiloff v. Dunn,* 343 A.2d 251, 257 (Md. 1975) (journalists barred from asserting that source provided any information to them); *Mitchell,* 361 P.2d at 750 (trial court may "indulge the presumption that defendant Watson admits that there was no [source] or that the [source] did not make the statement").

Such remedies "prevent defendants from using as a sword the information they are shielding from disclosure." *Sands,* 161 A.D.2d at 37. A journalist may testify that his information came from a confidential source, but these decisions allow the jury to draw an inference that a source who the journalist will not reveal really should not be considered reliable. *See, e.g., Sharon v. Time Inc.,* 599 F. Supp. 538, 583 (S.D.N.Y. 1984). Or, when the equities of the case leave no alternative, these decisions preclude a journalist even from asserting at all that "the information came from a 'reliable or confidential source,'" *Laxalt v. McClatchy,* 116 F.R.D. 438, 452 (D. Nev. 1987), or that a statement in a story was verified by such a source. *Kapiloff,* 343 A.2d at 522.

At the same time, limiting a court-ordered presumption to facts pertaining to the disputed source honors the First Amendment interests at stake and ensures that "the relief granted is no more than is reasonably necessary to protect legitimate interests." *Sands,* 161 A.D.2d at 37. If plaintiffs cannot prove elements of their claims that have nothing to do with confidential sources, they are not entitled to any presumptions on those elements, and judgment should be entered for the defendant. *See Sierra Life,* 623 P.2d at 109 (if plaintiff cannot create triable issue on element unrelated to source, judgment should be entered for defendant); *Kapiloff,*

343 A.2d at 265-71 (trial court should have entered judgment for defendant despite dispute over source because challenged statement was expression of opinion and plaintiff could not carry burden of proof on falsity). Indeed, if the law were otherwise, suing the press would be all too attractive, for any story grounded to some degree on confidential-source information – regardless of its validity – would hold out the possibility of obtaining a default judgment and millions of dollars based on the press's unwillingness to reveal the sources.

Second, courts also may impose a civil contempt order when the press refuses to disclose a source. The trial court here, in fact, entered a contempt order following Petitioners' noncompliance with its first disclosure order. But after Petitioners declined to comply with the court's second disclosure order, the court asserted that a contempt sanction would be inadequate to secure compliance. *See* Pet. App. 72a.

This conclusion was far too hasty. Petitioners, as is often the case under appellate rules, had to be held in contempt in order effectively to challenge the first disclosure order. *See, e.g., In the Matter of a Grand Jury Subpoena,* 583 N.E.2d 241, 243 (Mass. 1992). That they did so and succeeded in having that order vacated cannot provide the basis for entering an even more drastic sanction. Indeed, condoning the Massachusetts courts' view that *successfully* appealing a disclosure order justifies the sanction of default would present press defendants with an untenable Hobson's choice. When saddled with a disclosure order of dubious merit, the press would have to choose between obeying an unfounded contempt sanction or appealing but risking a default judgment for any future noncompliance and appeals.

The press should never be put to that choice when the sources are, in the Massachusetts Supreme Judicial Court's

words, "peripheral at best" to the claims and the viability of the claims has not been otherwise established. Pet. App. 49a. Whether or not protecting confidential sources comes directly within a First Amendment privilege, the chilling effect of compelled disclosure on reporting not just with respect to the story here but with respect to so many others of profound public concern (Watergate is but one recently discussed example) is altogether certain. At the very least, therefore, the First Amendment should not permit courts to compel the disclosure of sources when the courts have not yet determined that the underlying claim may be viable. The Massachusetts courts here, however, never ruled on Knox's pending summary judgment motion and the Supreme Judicial Court dismissed as a matter of law the claims against Dana-Farber for which the identity of sources was asserted to be necessary. Failing to decide those threshold questions of viability before forcing the press to choose between default and disclosure violated the Due Process Clause and First Amendment.

In sum, discovery sanctions far short of default, when administered properly, are more than adequate to address circumstances when the press does not comply with a disclosure order. This Court should grant certiorari to make clear that scuttling these options in favor of a default judgment on meritless claims punishes the press more than the Due Process Clause or First Amendment can bear.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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## APPENDIX A

## DESCRIPTION OF *AMICI*

ABC, Inc., through its subsidiaries, owns ABC News, the ABC Radio Network, and local broadcast television stations that gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20*, and *Nightline*.

Advance Publications, Inc., directly or through subsidiaries, publishes daily newspapers in twenty-six cities throughout the United States, including *The Republican* in Springfield, Massachusetts, and more than forty weekly business journals, including the *Boston Business Journal* and *Mass High Tech*. Advance Publications, Inc. also owns The Condé Nast Publications Inc., which publishes eighteen magazines with nationwide circulation, and Fairchild Publications, Inc.

The Associated Press, founded in 1848, is the world's oldest and largest newsgathering organization, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

CBS Broadcasting Inc., a wholly-owned subsidiary of Viacom Inc., produces and broadcasts news, public affairs and entertainment programming. CBS News produces morning, evening and weekend news programming, as well as news and public affair magazine programs such as *60 Minutes* and *48 Hours Investigates*. CBS owns and operates television stations nationwide.

Gannett Company, Inc. is an international news and information company that publishes 101 daily newspapers in the United States with a combined daily paid circulation of

7.6 million, including USA TODAY, which has a circulation of 2.2 million. Gannett publishes a variety of non-daily publications, including *USA Weekend*, a weekly newspaper magazine with a circulation of 23.7 million. The company also operates more than 130 web sites and a national news service. Gannett's twenty-two television stations cover 17.8 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines (including *Esquire*) and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

The Massachusetts Newspaper Publishers Association ("MNPA") is an association of approximately daily and weekly newspapers published throughout the Commonwealth. Its membership includes virtually all Massachusetts daily newspapers, and it is the recognized spokesman for all such newspapers in the Commonwealth. MNPA has filed briefs as an *amicus curiae* in Massachusetts appellate courts on numerous occasions over the past twenty years in matters affecting the interests of Massachusetts newspapers.

Metrocorp is the publisher of *Boston Magazine,* the Nation's second largest city magazine. *Boston Magazine* is published monthly and has been reporting on Boston's cultural and political trends since 1963.

New England Newspaper Association is the regional professional organization for the newspapers in the six New England states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. Founded in 1981, the result of a merger of two old line regional associations,

NENA services over 250 daily and weekly newspapers for the purpose of gathering and disseminating information among and for the benefit of its members, and to promote the common interests of newspapers published in New England. NENA is the central source of information for newspapers in New England circulating a monthly comprehensive newsletter and conducting 50-60 annual training sessions for the media.

New England Press Association ("NEPA") is a volunteer organization comprised of more than 460 member newspapers with a total circulation of 4.7 million and 9.5 million readers in the six-state region. NEPA was founded in 1950 for the purposes of sharing information and ideas, while promoting professionalism, growth and excellence in community journalism. NEPA administers a legal hotline offering pre- and post-publication advice free of charge, publishes a monthly bulletin distributed to every member newspaper and journalism school in New England concerning developments and trends in the newspaper industry, and offers other services designed to promote excellence in journalism.

Newspaper Association of America is a nonprofit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily circulation in the United States and a wide range of non-daily U.S. newspapers.

NYP Holdings, Inc. is the publisher of the *New York Post* newspaper (the "*Post*"). The *Post* is the country's oldest, continuously published newspaper, founded by Alexander Hamilton in 1801.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and

freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

Society of Professional Journalists is the Nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time, Fortune, Sports Illustrated, People, Money,* and *Entertainment Weekly.*

Supreme Court, U.S.
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(4)

No. 04-1634

IN THE

# Supreme Court of the United States

GLOBE NEWSPAPER COMPANY, INC.
and RICHARD A. KNOX,

*Petitioners,*

*v.*

LOIS J. AYASH, M.D.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

## REPLY BRIEF

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## STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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In her 30-page Opposition Brief, Respondent Lois J. Ayash, M.D. ("Ayash") never actually addresses the important federal constitutional issues in fact raised by the petition in this case: Whether the First Amendment and the Due Process Clause permit trial courts to enter a default judgment overriding the constitutional requirements of a public figure *libel* case as a sanction for the failure to identify confidential news sources sought exclusively for a plaintiff's *non-libel* (and legally deficient) civil tort claims.

This issue is presented clearly and simply in a recurring context – a request by a civil plaintiff for an order compelling the disclosure of confidential news sources. There are no "fact-based inquiries" required. Ayash concedes, as she must, that the confidential sources were sought exclusively for her non-libel claims and that the resulting sanction included a default judgment on her unrelated libel claims. Her statement that this case "does not involve any question about what Petitioners published" (Opp. 1) is perversely true – the $2.1 million judgment was entered in favor of a public figure without regard to whether the publications at issue were false or published with actual malice. *Compare Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 50, 52 (1988) (First Amendment "allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability") (emphasis in original).

Because of the default judgment, editorial criticisms of the Dana-Farber Cancer Institute that made no mention of Ayash, on-the-record statements by the hospital about the scope of its investigation, and accurate reports that Ayash was investigated and later reprimanded for her role in the overdose incidents lost all of their constitutional protections against libel awards despite that, as Ayash concedes, the confidential sources were not sought for her libel claims. Indeed, Globe Newspaper Company suffered a $1,680,000 libel verdict as a result of the discovery sanction *even though it was not even a party to any of the claims in which the discovery*

*was sought.* Ayash's extraordinary argument that no important First Amendment or Due Process issues are raised when a state court uses its discovery powers in such a manner only demonstrates the grave and far-reaching constitutional consequences of the Supreme Judicial Court's decision. The importance of the constitutional interests at stake in this case, combined with the direct conflicts between the decision of the Massachusetts Supreme Judicial Court and decisions of this Court, the federal courts of appeal, and state courts of last resort, well-warrant certiorari review.

## ARGUMENT

### A. The Contempt Sanction of a Default Judgment Directly Conflicts with Constitutional Decisions of this Court, the Federal Courts of Appeal, and State Courts of Last Resort.

1. The contempt sanction affirmed by the Supreme Judicial Court – entry of a default judgment on a libel claim in which the discovery was *not* sought – directly conflicts with constitutional decisions of this Court, federal courts of appeal and state courts of last resort. In *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 706, 707 (1982), this Court ruled that, under the Due Process Clause, trial courts have no discretion to enter discovery sanctions unless they are "specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. at 707. Ayash's brief totally fails to address the conflict between the lower court's decision and *Insurance Corp. of Ireland.* Instead, she accuses respondents of failing to recognize that default judgments are permissible sanctions under *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322 (1909). Opp. 18. In so doing, she ignores that *Hammond Packing* has been definitively interpreted by this Court as limiting discovery sanctions to the particular claim in which the discovery was sought. *Insurance Corp. of Ireland,* 456 U.S. at 707. *See also General Ins. Co. of Am.* v. *Eastern Consol. Util., Inc.,* 126 F.3d 215, 220-21 (3d Cir. 1997).

2. Having averted her eyes from the lower court's direct conflict with decisions of this Court, Ayash next misreads the opinions of the Third and Ninth Circuit Courts of Appeal in a futile attempt to avoid the obvious conflict between those courts' decisions and that of the lower court. *See* Opp. 27. For example, contrary to Ayash's contention, the constitutional flaw in the sanction reviewed in *United States* v. *Kahaluu Const. Co., Inc.*, 857 F.2d 600, 602 (9th Cir. 1988), was that it was not limited to the claim in which the discovery violation occurred. *Id.* at 602. *See also General Ins. Co. of Am.*, 126 F.3d at 220-21 (due process prohibits court from ordering that designated facts be taken as true "when those facts are unrelated to the claim or defense with respect to which the discovery is sought"); *Fjelstad* v. *American Honda Motor Co., Inc.*, 762 F.2d 1334, 1342 (9th Cir. 1985) (construing *Insurance Corp. of Ireland* and *Hammond Packing* as imposing due process requirement that discovery sanctions must be specifically related to the particular claim at issue in the order to provide discovery).

3. Indeed, Ayash is so intent on ignoring the important constitutional issue — and the significant conflict — created by the lower court's decision that she cites the Eleventh Circuit's opinion in *Adolph Coors Co.* v. *Movement Against Racism and the Klan*, 777 F.2d 1538 (11th Cir. 1985) as the only court of appeals case to address the "same issue" presented here. Opp. 26. In *Coors*, however, the default judgment was entered in the same libel claim in which the discovery was sought — the very thing that did *not* happen here. 777 F.2d at 1542-43. Ayash's citation to *Sivelle* v. *Maloof*, 573 F.2d 520 (1st Cir. 1967) is similarly misplaced. Opp. 24. The *Sivelle* court simply affirmed the entry of a default judgment in a libel case as a sanction for refusing to provide discovery sought in that same libel case.

4. Moreover, neither *Coors* nor *Sivelle* dealt with sanctions enforcing orders to disclose confidential news sources. State courts of last resort that actually have addressed the issue have held — in direct conflict with the Supreme Judicial Court — that constitutional considerations

prohibit the entry of a default judgment for the refusal to disclose confidential sources unless the withheld discovery would have itself produced proof sufficient to sustain the judgment. *See Sierra Life* v. *Magic Valley Newspapers*, 101 Idaho 795, 799-801, 623 P.2d 103, 108-110 (1980) (default judgment violated due process because there was no suggestion that revelation of confidential source would have produced sufficient proof to sustain a judgment); *Mitchell* v. *Watson*, 58 Wash. 2d 206, 361 P.2d 744 (1961) (due process violation to enter default judgment on libel claim for refusal to identify source given limited relevance of source and availability of preclusive order for failure to disclose). The standard applied by these state courts of last resort directly conflicts with the decision of the Supreme Judicial Court, which affirmed a default libel judgment entered on a claim in which the discovery was not sought.

Ayash seeks to avoid the obvious conflict that exists between the Supreme Judicial Court's decision and rulings of other state courts of last resort by misreading *Sierra Life* and *Mitchell* as turning on the fact that the discovery "was not related to a claim against the party refusing to produce it." Opp. 29. Even if the cases stood for that proposition (and they do not), they still would be in direct conflict with the Supreme Judicial Court's decision, which affirmed a $1,680,000 libel judgment against the Globe even though the Globe was not a party to any of the claims in which the confidential sources were sought. The conflict between the rationales and holdings of those courts and that of the Supreme Judicial Court therefore is direct and inescapable.[1]

1. Ayash also claims that the lower court's decision does not conflict with *Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 166-67, 464 N.E.2d 967, 971 (1984), because the latter case involved New York's shield law. The *Oak Beach* Court ruled, however, that the shield law did not provide absolute immunity from all legal consequences for refusing to disclose a confidential source; the primary ground for reversing the default judgment was that the "general rule, that the demanding party should not be granted more relief for nondisclosure than is reasonably necessary to protect legitimate interests . . . should be applied with special force in cases involving nondisclosure of sources by newspapers and journalists." 62 N.Y.2d at 166-67, 464 N.E.2d at 971.

Learning the identity of the sources was equally irrelevant to Ayash's emotional distress claim against Knox (assuming that was a legally viable claim, which it was not, *see* § B infra). Knox advised the trial court that he would not rely on the identity of the sources in any way in defending against the claim and would accept whatever finding the plaintiff proposed as to the sources' identity. March 12, 2001 Contempt Hearing Tr. 26-28, 32-35. Under these circumstances, the entry of a default judgment on the emotional distress claim as a penalty for non-disclosure was wholly punitive and conflicts with the standard applied by other state courts of last resort.

5. Ayash also contends that the default judgment raises no significant constitutional issues because lesser sanctions, such as the fines earlier imposed by the trial court, had not been effective in coercing the Globe and Knox to disclose the confidential sources. *See* Opp. 11, 16. This is "a comfortable doctrine, to which we can have but one objection: namely, that it is not true".[2] The fines earlier imposed by the trial court were immediately stayed pending appeal and, in fact, never became due and payable because the underlying contempt sanction was overturned on appeal. App. 88a. If the fines lacked efficacy, it was because they were reversed before they ever took effect, hardly a justification for entry of a more severe sanction on remand.[3]

6. Apparently recognizing that her status as a public figure makes the default judgment all the more indefensible, Ayash — incredibly — denies that that any such public figure determination was made. *See* Opp. 9, 21. Here too, there is no fact-intensive inquiry for this Court to make. The Supreme Judicial Court's holding that Ayash is a public

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2. *In re Globe Newspaper Co.*, 729 F.2d 47, 54 (1st Cir. 1982), *quoting* H. Fielding, *Tom Jones*, Book XV, ch. 1 (speaking of the notion that virtue is rewarded).

3. As the cases cited at pages 17-18 of the Petition demonstrate, the trial court had an array of alternative sanctions available to it — all employed by other courts facing comparable situations — that it simply chose to ignore.

figure was clear and unambiguous: "This is a case where the plaintiff (unwillingly) achieved public figure status by reason of her status as chair and principal investigator of an experimental research protocol under which two patients at a prominent research institution received chemotherapy overdoses." App. 22a. *See generally Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (recognizing category of involuntary public figure).

7. None of the reasons for granting certiorari stated above or at pages 10-19 of the Petition depend in any way on the existence of a reporter's privilege or any special constitutional protections for the press. Nor, for that matter, do they depend on any findings concerning the merit (or lack thereof) of Ayash's non-libel claims that formed the basis for the underlying discovery order. They do depend, however, on an even-handed application of important First Amendment and Due Process principles to all members of the public, including the press. The Supreme Judicial Court's decision directly conflicts with decisions of this Court and lower federal and state courts applying these principles. The petition for certiorari should be granted to resolve this conflict and to review the significant constitutional issues raised by the Supreme Judicial Court's decision.

**B. The Supreme Judicial Court's Decision Affirming an Order Compelling the Disclosure of Confidential Sources in Pursuit of Legally Deficient Claims Conflicts with Decisions of Federal Courts of Appeal and State Courts of Last Resort and Violates Petitioners' First Amendment Rights.**

8. Pages 19-25 of the Petition addressed the conflict between the Supreme Judicial Court's ruling that the First Amendment provides absolutely no protection against the forced disclosure of confidential sources — even in pursuit of legally meritless claims — and decisions of federal courts of appeal and state courts of last resort (courts that Ayash now apparently concedes have reached contrary results). It is no answer for Ayash to assert that the Supreme Judicial

Court has recognized some common law protections for confidential news sources. The constitutional standard applied by other lower courts – including Massachusetts federal courts – requires a plaintiff seeking to compel disclosure to establish, among other things, "jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980). *See also Price* v. *Time, Inc.*, __ F.3d __, 2005 WL 1653730 *14 (11th Cir. July 15, 2005) (First Amendment requires, *inter alia*, party seeking disclosure to present "substantial evidence" that statements are actionable). In stark contrast, the standard applied by the Supreme Judicial Court permits the forced disclosure of confidential sources in pursuit of claims that fail as a matter of law. This is a direct, outcome determinative conflict on a significant First Amendment issue justifying certiorari review.

9. Ayash argues that because trial courts have discretion to supervise discovery disputes, the discovery order in this case raises no First Amendment issues worthy of certiorari review. As Justice Frankfurter once stated, however, judicial discretion is not a "legal abracadabra," but rather "impl[ies] standards of conduct within the comprehension of the laity in whose interests they are enforced[.]" F. Frankfurter, *The Case of Sacco and Vanzetti*, § VI, The Atlantic Monthly (March 1927). Incanting the words "judicial discretion" does not alter the fact that the Supreme Judicial Court affirmed an order requiring the disclosure of confidential sources in pursuit of legally meritless claims.

10. For example, Ayash concedes that she sought the identity of the confidential sources to discover who leaked confidential information about the overdose investigations to the Globe. *See* Opp. 4, 7, 8-9. She also concedes that the trial court found that the Globe and Knox's publication of that confidential information was privileged under the First Amendment as accurate reports on a matter of legitimate public concern (a ruling from which she took no appeal).